FILED
JUN 14 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 165

THE BORIN CORPORATION, formerly Zero Ice Corporation,
Petitioner (Appellant Below),
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent (Appellee Below)

PETITION FOR WRIT OF CERTIORARI

THEODORE LEVIN,
BAYRE LEVIN,
Attorneys for Petitioner,
1250 Penobscot Building,
Detroit, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1-10
Opinions Below	2
Basis of Jurisdiction	2
Summary Statement of the Matter Involved	2-8
The Board's reasons for rejecting its own Findings of Fact	5-6
The reasons of the Circuit Court of Appeals for rejecting the Board's Findings of Fact	6-8
Reasons Relied Upon for Allowance of the Writ	8-10
Brief in Support of Petition for Writ of Certiorari	11-24
Opinions of the Courts Below	11
Jurisdiction	11
Statement of the Case	11
Specification of Errors	12
Argument	12-23
(a) Preliminary Statement	12-13
(b) The Refusal of the Circuit Court to Adopt the Facts as Found by the Board	13-20
(c) The Rule Relating to Parol Evidence Cannot Be Invoked by a Stranger to the Instrument	20-23
Conclusion	23-24

132526

INDEX TO AUTHORITIES CITED

	Page
Avery v. Commissioner (C. C. A. 5), 22 Fed. (2d) 6	13
Belridge Oil Co. v. Helvering (C. C. A. 9), 69 Fed. (2d) 432	13
Holmes and Brewster's Federal Tax Appeals, 1927, page 320	21
Jones' Commentaries on Evidence, 1926, Vol. 3, p. 2711	22
McMaster v. Insurance Co., 55 N. Y. 222	22
O'Shea v. N. Y., C. & St. L. R. Co., 105 Fed. 559 at p. 563 (C. C. A. 7)	23
Paul and Merten's Income Tax, Vol. 5, Sec. 43.74	20-21
Paul and Merten's Income Tax, Vol. 2, Sec. 11.49	21
Powers Manufacturing Co. v. Commissioner (C. C. A. 8), Fed. (2d) 225	13
Prairie Oil & Gas Co. v. Motter, 66 Fed. (2d) 309 at 311 (C. C. A. 10)	14
Sigua Iron Company v. Greene, 88 Fed. 207 (C. C. A. 2nd)	21
Tracy, et al., v. Commissioner (C. C. A. 6), 53 Fed. (2d) 575	13

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No.....

THE BORIN CORPORATION, formerly Zero Ice Corporation,
Petitioner (Appellant Below),

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent (Appellee Below)

PETITION FOR WRIT OF CERTIORARI

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record; italics supplied)

To the Honorable, The Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

The petitioner above named prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit affirming the decision of the United States Board of Tax Appeals redetermining deficiencies against the petitioner in income and excess profits taxes determined by the respondent.

1. OPINIONS BELOW

The opinion of the Board of Tax Appeals appears on page 22, and the opinion of the Circuit Court of Appeals appears on page 96 of the record.

2. BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

The decision of the Circuit Court of Appeals was entered on February 14, 1941. A petition for rehearing was duly filed and denied without opinion on March 14, 1941.

3. SUMMARY STATEMENT OF THE MATTER INVOLVED

The suit involves the single question of the actual basis of cost to the petitioner of certain machinery and equipment (collectively referred to as the "Plant") for the manufacture of dry ice (solid carbon dioxide gas), purchased by the petitioner from the York Ice Machinery Corporation. If the cost of the plant was the sum of $146,800, the contract price stipulated in a formal written contract dated October 10, 1930 (Exhibit 1, R. 39, 53) between the vendor and the petitioner for the sale and

installation of the plant by the York Corporation, there is no deficiency in taxes. This was, as is shown in the brief, the actual cost according to the findings of fact of the Board of Tax Appeals.

Subsequent to completion of installation *and after acceptance of the plant* by the petitioner (Opinion of Board, R. 25) its performance proved to be inadequate and unsatisfactory, in breach of the warranty in the contract that the plant would produce ten tons of dry ice per twenty-four hour day.

Through the efforts of the engineers of the vendor exerted for eighteen months after the time of acceptance, the defects were remedied in November, 1932, and at such time, the plant was acknowledged to be in accordance with the warranty contained in the contract. In the meantime, however, large damages had been sustained through the delay which were the subject of protracted and controversial negotiations between the parties. The Board found, as a fact, that damages had been sustained by the petitioner, and that the negotiations had culminated in an agreement made in Detroit by the representatives of the York Corporation to pay the sum of $84,800 as damages for breach of warranty and that the settlement was to be effectuated by the sending from York, Pennsylvania, of a credit memorandum against the balance of $132,800 then owing after the payment of $12,000 initially made when the contract was signed. Instead, however, of such credit memorandum being sent, the York Corporation telephoned and "expressed the desire to dispose of the matter through the execution of a new contract which would definitely fix the liabilities and rights of the parties with respect to the said machinery" (Opinion of Board, R. 27). Only this telephone call intervened. The petitioner *immediately assented* "because we got our full credit for the $84,800, which we had lost under the first contract" (R.

45). It was not suggested by the respondent or found by the Board that the adoption of this method of effectuating the settlement, arose from *any change in the purpose of the parties* that a credit for damages in the amount of $84,800 should be allowed against the stipulated purchase price. An agreement dated November 7, 1932 (Ex. 7, R. 46, 77) was signed, purporting to sell the plant for $72,467, of which the sum of $12,000, actually paid over two years before when Exhibit 1 was signed, was then acknowledged to be paid, and reciting a remaining obligation of $60,467. The purported balance of $60,467 was shown to include a liability of $10,467 (R. 46) to the York Corporation arising out of an entirely independent transaction. The declared purchase price of $72,467 was, as found by the Board, the actual balance owing under the first contract, after crediting the damages in the amount of $84,800 and after debiting against the petitioner the liability independently arising of $10,467.00; and the formal books of the York Corporation and the testimony of its officers confirm the fact (R. 47) that there was a continuation of the original liability, as reduced by the credit for damages, and that no new sale was made. The plant having finally been acknowledged to be in conformity with the warranty in the original contract, there was no reason why the purchase price originally calculated should not have been, as it was, the basis for calculating the residual liability declared in the agreement of settlement.

The agreement of settlement omitted the warranty as to quantity and quality of production which had given rise to the controversy and carried a final statement that the rights of the parties under the former contract be mutually cancelled and that it be rescinded. It also repeated some of the provisions of the first agreement with respect to apparatus *to be furnished* and other terms which then mainfestly had no application or relevancy to a completely executed contract.

The Board's Reasons for Rejecting Its Own Findings of Fact

It was provided by the first contract that in the event of breach of warranties the damages be restricted to direct damages and not consequential damages. The Board found (Opinion of Board, R. 30),

> "Even *though the sum of $84,800 as damages was agreed to* * * *, many of the items making up that sum may not reasonably be classified as direct damages as contrasted with consequential damages."

From this fact alone, and in denial of the express finding that such sum of $84,800 was the agreed damages, the Board derives,

> "* * * an obvious inference that the York Corporation is not liable for damages, but realizing and recognizing the difficulties which had been encountered by its first purchaser of dry ice machinery, had agreed in the contract of November 7, 1932 to a reduced purchase price for the plant." (Opinion of Board, R. 29).

The only valid inference from the execution of the second agreement *consistent with the facts as found* is that the parties intended to state the account then existing arising from all purposes; accordingly, the obligation in the first agreement which had been superseded by the stated obligation in the second agreement was of necessity "mutually cancelled and rescinded." The appearance of these words, however, are expressly accepted by the Board as proving that the sum of $84,800 was a reduction of the purchase price and that the actual cost was $62,000.00. This language is made to support a conclusion that *the sale and purchase itself which had been completed and executed two years before* had in some way been destroyed. The deficiencies in taxes claimed by the

respondent arise from the larger net gain realized upon resale and the smaller depreciation allowed during the period of ownership on the basis of a cost of $62,000.00 instead of $146,800.00.

The Reasons of the Circuit Court of Appeals for Rejecting the Board's Findings of Fact

No attempt is made by the Circuit Court of Appeals to show that the form used to give expression to the residual rights and liabilities resulting from the settlement *was inconsistent with the purposes intended to be accomplished by the parties as found by the Board. The finding that damages were suffered, that they were agreed upon and that they were allowed, is not challenged by resort to anything appearing in the record.*

The Circuit Court of Appeals appears to invoke in this controversy between a third party to the agreement, namely the respondent, and the petitioner, the rule relating to parol evidence, in deviation of the well-settled principle that in a controversy involving a stranger, this rule of estoppel has no application. The Court says, invoking the bare language of the agreement and *expressly disregarding all antecedent evidence and findings* proving the substance of the transaction:

> "* * * under elementary rules of law the previous negotiations were merged. This contract deliberately executed, shows that the York Corporation did not, as contended, agree that the petitioner had an enforcible claim against it for $84,800 * * * the purpose of the contract is found in the agreement of the parties."

It must be confessed, however, that the other reasons of the Circuit Court of Appeals are obscure. The Court says (R. 100),

> "The York Corporation was *unwilling* to give a credit memorandum in this amount and *insisted* that the matter be disposed of through the execution of a new contract."

This recital of fact is without any support in the findings of fact or the opinion, or elsewhere in the record. There is no suggestion that the York Corporation was "unwilling" to give a credit memorandum or that it "insisted" on a new contract. Such an implication that the parties intended a different legal result from that which would follow a credit memorandum, is directly contrary to the intention of the parties as shown by the evidence and to the findings of the Board. The Court's statement that (R. 100) "the York Corporation *at no time admitted* that it was liable under the contract for $84,800," is not only the direct opposite of all the evidence but a summary rejection of the Board's finding of fact that there was an express agreement to pay damages in the amount of $84,800 arrived at after the most contentious and protracted negotiations; nor is it possible to find any support for the statement (R. 100) "as part of that adjustment, the York Corporation sold and the petitioner bought the plant at a greatly reduced figure."

Equally inexplicable is the statement (R. 101) that the petitioner "contends that the subsequent agreement did not carry the legal consequences which attach to the language employed by it." It is manifest from the petitioner's entire presentation that its contention is the direct contrary of that ascribed to it. The crux of its argument is that the first agreement having been completely executed by the York Corporation, there remained only the obligation to pay the residual balance; and that the legal consequences of the second agreement acknowledging liability for such residual balance were precisely *the same legal consequences* which flowed from the agreement to allow a

credit of $84,800 against the stipulated purchase price. Surely a purported obligation calling for a sale and installation by the York Corporation, which had in fact long before been completely executed by the obligor, could not be termed a change in the legal consequences.

The agreement on the part of the York Corporation to sell and install the plant having been completely executed, the error of law into which the Court has fallen is self-evident from the following statement in its opinion, R. 99:

> "Although the buyer acknowledged that the plant conformed to the specifications, *since no deferred payment was made,* title was retained by the seller, and did not vest in the buyer until completion of the payments provided for in the new contract of 1932. The principal agreements of the contract of 1930 still remained unexecuted."

The title was retained under the first contract as well, and the deferred payments were withheld because of the admitted breach of warranty. It is submitted with respect that the security retained by the York Corporation in the form of a legal title did not prevent the contract from becoming completely executed on its part.

4. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

(1) The decision of the Circuit Court of Appeals is in conflict with the decisions of all other Circuit Courts of Appeals, holding that the findings of fact of the Board of Tax Appeals is binding and conclusive upon an Appellate Court where supported by evidence.

(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of all other Circuit Courts of Appeals, holding that the rule relating to parol evidence

has no application in a controversy involving a stranger to a contract.

(3) The decision of the Circuit Court of Appeals is a decision on an important question of federal law in conflict with applicable decisions of this Court, holding that the findings of fact of the Board of Tax Appeals is binding and conclusive upon an Appellate Court if supported by evidence.

(4) The decision of the Circuit Court of Appeals is a decision on an important question of Michigan law probably in conflict with local decisions, holding that a stranger to a contract cannot invoke the parol evidence rule for the purpose of preventing an inquiry into the real purpose and circumstance of the transaction.

(5) The decision of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure on petitions to review a decision of the Board of Tax Appeals, insofar as the substance of the transaction has been rejected in favor of its supposed form, as to call for an exercise of this Court's power of supervision.

Wherefore petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination, as provided by the statutes of the United States, a full and complete transcript of the Record and all proceedings in the case numbered and entitled on its docket "No. 8477, The Borin Corporation, formerly Zero Ice Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent," and that the judgment therein of the said Circuit Court of Appeals be reversed by this Court, and that your peti-

tioner may have such other and further relief in the premises as to this Court may seem just and proper.

THE BORIN CORPORATION, formerly
Zero Ice Corporation.
By THEODORE LEVIN,
Its Attorney.

Dated: June 5, 1941.

THEODORE LEVIN and
BAYRE LEVIN,
Attorneys for Petitioner,
1250 Penobscot Building,
Detroit, Michigan.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The opinion of the Board of Tax Appeals is reported in 39 B. T. A. 712 and the opinion of the U. S. Circuit Court of Appeals for the Sixth Circuit is reported in 117 Federal Reporter (2nd), p. 917.

II.

JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

The decision of the Circuit Court of Appeals was entered on February 14, 1941. A petition for rehearing was duly filed and denied without opinion on March 14, 1941.

III.

STATEMENT OF THE CASE

A concise statement of the case containing all that is material, in the opinion of the petitioner, to a consideration of the questions presented appears under "Summary Statement of Matter Involved" in the preceding petition.

IV.

SPECIFICATION OF ERRORS

The errors in the decision of the Circuit Court of Appeals which are relied upon by the petitioner are set forth in the divisions of the petition under the headings "The Board's Reasons for Rejecting Its Own Findings of Fact," p. 5, *Supra,* "The Reasons of the Circuit Court of Appeals for Rejecting the Board's Findings of Fact," p. 6, *Supra,* and "Reasons Relied Upon for Allowance of the Writ," p. 8, *Supra.* The petitioner will rely upon and urge before this Court all the errors therein assigned which are now adopted for the purpose of this brief.

V.

ARGUMENT

(a) Preliminary Statement

Underlying all of the errors assigned, is the protest of the petitioner against the express acceptance by the Circuit Court of Appeals of the language of the agreement of settlement dated November 7, 1932 (Exhibit 7, R. 46, 77) as the exclusive basis for determining the substance of the transaction. The fact is ignored that such agreement event as literally construed under the parol evidence rule which is here inapplicable, fails to support the conclusion that the cost was $62,000.00; the literal construction of such agreement provides for a cost of $72,467.00. But the Court has assumed a series of facts in contradiction of all the evidence in the record and the express findings of fact of the Board. The Board of Tax Appeals on the other hand, places its decision on a single simple ground. Hav-

ing found as a fact that damages were sustained and that the York Corporation had agreed (R. 27) to allow $84,800.00 as such damages against the cost under the contract of October 10, 1930, (Exhibit 1, R. 39, 53) it rejects the inescapable consequences of such findings. *The basis for the rejection is not any finding that the parties subsequently intended to alter or change such agreement.* The conclusion of the Board is made to rest entirely upon the language in the second contract providing for the cancellation and recission of the rights of the parties under the first contract. If it is assumed that the only unexecuted obligation was on the part of the petitioner and such obligation was to pay the balance of $50,000 (included in the aggregate obligation acknowledged in the second contract) it is surely understandable that the parties should provide for the cancellation of the earlier and duplicate expression of liability.

(b) The Refusal of the Circuit Court to Adopt the Facts as Found by the Board

In appeals from decisions of the Board of Tax Appeals, it is the settled rule that both the petitioner and the Court are bound by the Board's express findings of fact.

Powers Manufacturing Co. v. Commissioner (C. C. A. 8), Fed. (2d) 225;
Avery v. Commissioner (C. C. A. 5), 22 Fed. (2d) 6;
Tracy, et al., v. Commissioner (C. C. A. 6), 53 Fed. (2d) 575.

The primary function of an Appellate Court in appeals from decisions of the Board of Tax Appeals is to determine *"whether or not the facts found sustain the legal conclusions reached." Belridge Oil Co. v. Helvering* (C. C. A. 9), 69 Fed. (2d) 432.

It is likewise settled that the substance of the transaction and not its form constitutes the basis for tax liability; and the Commissioner is as definitely precluded from invoking the form of the transaction to support his claim for taxes as the taxpayer is from invoking the form to escape taxes. Thus in *Prairie Oil & Gas Co. v. Motter*, 66 Fed. (2d) 309 at 311 (C. C. A. 10), the Court said:

> "His position (that of the Collector of Internal Revenue) is that the Court should close its eyes to the events prior to April 1st, and consider only the fact that the Prairie owned all the Olean stock on that day; that it then transferred to the Prairie all its properties in consideration of a cancellation of its stock. If a taxpayer sought to avoid a tax on the profits of such a sale as this by asking the Commissioner to ignore the actualities, he would shortly and properly be reminded that taxation *is an intensely practical matter and that the substance of the thing done, and not the form it took, must govern.*"

The substance of the transaction admits of no controversy. The basis of cost as established by Exhibit 1 was $146,800.00. Was there any change in this cost? The Board's express finding is that damages were agreed to be allowed against such cost. The parties had been negotiating for months as to the amount of damages. A protracted examination of the books of the Petitioner wherein the losses were currently recorded had been made by the York Corporation. The Board of Tax Appeals found (R. 26, 27):

> "In the Fall of 1932, the negotiations (to determine the amount of the damages) culminated in an understanding that the York Corporation would allow an adjustment on the transaction in the total sum of $84,800.00 arrived at as follows:

(Here the Board set forth in its opinion the items of damages recognized by both parties as making up such sum of $84,800.00).

"Total amount agreed upon as damages and set off against the liability... $84,800.00"

Counsel for the respondent stipulated at the hearing (R. 44) that the letter signed by the York Corporation (Exhibit 6, R. 43, 74) did show "how the calculation (of damages) was made." The failure by the Court to take notice of the agreement, established by the record and found by the Board, to pay damages in the amount of $84,800.00, is in deviation of the express stipulation of the respondent's counsel *that the damages were in fact calculated by the York Corporation in the amount of $84,800.00 as shown by Exhibit 6.*

The entire question of damages was a matter of the most deliberate and meticulous calculation between the parties. By Exhibit 2 (R. 41, 68), being a letter from the York Corporation to the petitioner, the question of damages is referred to and an arrangement is made to examine the books of the petitioner in Detroit. It appears from Exhibit 3 (R. 41, 69), that on April 20, 1932, the petitioner had telegraphed the York Corporation as follows:

"Have your letter April 12. Books open for your inspection at any time."

By Exhibit 4 (R. 41, 70), reference is made to the data taken from the books and to the proposed discussion on the basis of such data. By Exhibit 5 (R. 41, 70), on the basis of detailed calculations made from the books of the petitioner and enclosed in the letter, the York Corporation suggests "that the grand total estimated loss is $20,342.67." According to its sales executive such sum

of $20,342.67 represented the York Corporation's estimate of the damages which had accrued only to June 16, 1932 and only upon the items then dealt with (R. 47).

It is not the purpose of counsel completely to review the uncontradicted evidence with respect to the damages suffered and the consistent and repeated admissions of liability on the part of the York Corporation. Over a period of many months while the negotiations were proceeding, the York Corporation admitted verbally and in writing on many occasions its liability for damages and its desire to pay damages; and the Board has found an express agreement to pay damages in the amount of $84,800.00.

To apply to the agreement whose only purpose it was to state and settle the full account between the parties and to preclude a reassertion of claims on the warranty, an interpretation contrary to the substance of the transaction, is without warrant even if the parol evidence rule applied. *The very execution of the agreement confirmed the antecedent satisfaction of the liability in the amount agreed upon.* The purpose of the agreement in the words of the Sales Manager of the York Corporation (R. 45) was "to clear themselves from further liability under this contract" (of October 10, 1930). It was the method agreed upon by the parties, as found by the Board (R. 27), of manifesting the settlement of "the difference between the petitioner and the York Corporation" instead of a credit memorandum for damages "in the amount of $84,800.00, agreed upon, against petitioner's liability under the original contract." The proposal of executing a new agreement was adopted (R. 27), "to dispose of the matter and to fix the liabilities and rights of the parties with respect to the said machinery." The claim for damages having thus been satisfied by the acceptance by the York Corporation

of an acknowledgment by the petitioner of the smaller unpaid balance resulting from the application of the credit, the new contract establishing the changed account was drawn. The suggestion came from the York Corporation "in order to clear themselves from further liability under this (October 10, 1930) contract" (R. 45). The remaining liability of $50,000 "with respect to the said machinery" having been included in the acknowledged liability of $60,467 secured and preserved by the new contract, the expression of the money obligation as originally fixed by the contract of October 10, 1930 (Exhibit 1) was superseded. So also was the obligation of the York Corporation to satisfy the warranties in such contract. The old contract having been satisfied.

> (a) by the York Corporation with respect to the installation and delivery of the plant in a manner acknowledged as satisfactory, and
>
> (b) by the petitioner to the extent of the sum of $96,000, being the amount of damages allowed and the initial payment of $12,000.00,

there remained nothing for the York Corporation to do further. There remained for the petitioner (apart from its obligation independently arising to repay a loan and interest) only the obligation to pay $50,000, the balance owing upon the plant. The right to receive and the liability to pay were to continue. Thus, the agreement of settlement was designed to carry forward and preserve the unexecuted and unsatisfied part of the contract (Exhibit 1). Thus, the earlier contract could consistently be rescinded and the subsequent contract relied upon, as found by the Board (R. 27), as fixing "the liabilities and rights of the parties with respect to the said machinery." The provisions of the new contract could safely be accepted as exclusively defining and regulating the rights and obli-

gations of the parties which continued in existence; and the rescission of the earlier contract was in substance a declaration, firstly that the York Corporation had prior thereto carried out its bargain to provide a plant of the specified usefulness, and secondly that the petitioner had satisfied its money obligations except to the extent preserved by the new agreement.

Surely it is not the function of the Court to supervise the negotiations between the parties. The Commissioner of Internal Revenue might have made a better bargain for the York Corporation by rejecting some of the damages as "consequential." But the parties did their own bargaining and came to their own result.

The Court states in its opinion, "The contract of 1930 was never consummated in such manner as to preclude rescission" (R. 99). But the Board found as a fact that the plant was not objected to within thirty days (R. 30). As a result, under the terms of the original contract, this constituted on the part of petitioner, "a complete acceptance of the same as fulfilling all the terms and requirements of the contract relating thereto" (R. 66). But, the contract of sale carried an independent guarantee (R. 59) that the plant would produce ten tons of dry ice in each twenty-four hours. It was the delay in making the plant conform with this guarantee that resulted in petitioner's damages and the Board found that the negotiations with respect to this claim for damages "culminated in an understanding that the York Corporation would allow an adjustment on the transaction in the total sum of $84,800.00, * * *" (R. 26).

No reason indicating a contrary intention of the parties is suggested. The Court has declined to give effect to their expressed agreement to pay damages in the sum of $84,800, stating, "But the York Corporation was unwilling

to give a credit memorandum in this amount, and insisted that the matter be disposed of through the execution of an entirely new contract, in which, under elementary rules of law, the previous negotiations were merged'' (R. 100). This statement is entirely without support.

Why weren't the damages of $84,800 manifested by a credit memorandum? This would appear from the opinion of the Court to be the crucial question. The York Corporation had agreed to allow $84,800 as damages. What intervened to change the character of such allowance? Absolutely nothing. The only thing that happened was that ''After consideration of the matter, however, the York Corporation expressed the desire to dispose of the matter (the allowance of damages) through the execution of a new contract which would definitely fix the liabilities and rights of the parties with respect to the said machinery'' (R. 27). The new contract was suggested by the York Corporation ''in order to clear themselves from further liability under this contract'' (of October 10, 1930, R. 45), and the new contract was agreeable to the petitioner because ''we got our full credit for the $84,800 which we had lost under the first contract'' (R. 45). The York Corporation wanted no further or additional claims to be presented in connection with this transaction and petitioner was satisfied with the allowance of its claim for damages. It is submitted with great earnestness that there is nothing in the record *justifying a deduced finding of fact that the damages were not paid as agreed,* contrary to the express finding of fact that the parties had agreed upon the settlement of damages and had agreed to allow a credit in the amount of $84,800. This credit of $84,800 was actually made under the first contract in the books of the York Corporation (Exhibit 8, R. 47, 83).

In other words, the parties had agreed to a settlement, the form of which was to be manifested by a credit

memorandum, after which the York Corporation "expressed the desire" to adopt a different form. The petitioner was interested only in the amount of the credit and not in the form it was to take. The sworn testimony of the men who negotiated the settlement for both parties expressly excluded any suggestion or inference that the form of the transaction ultimately used represented any change in the intention of the parties as found by the Board.

(c) The Rule Relating to Parol Evidence Cannot Be Invoked by a Stranger to the Instrument

The Circuit Court of Appeals erred in assigning to the language of the agreement an intention contrary to the intention found by the Board. No estoppel could properly be invoked by the respondent against the Petitioner on the basis of the written instrument. The form of the settlement agreement was selected by the York Corporation and the Petitioner for their own purposes. Both of the parties are bound by *their legal act* and the *legal effect accomplished by each in relation to the other party.* As to the effect, in relation to others, of such a writing, Professor Wigmore says (Volume IX on Evidence, 1940 Edition, Section 2446), as follows:

> "But so far as other effects and purposes are concerned, the writing has not superseded their other conduct, nor other persons conduct, and it may still be resorted to for any other purpose for which it is material, either by other persons or by themselves."

This ancient rule has been recognized and applied without qualification by all Federal and State Courts.

> "The familiar rule that an instrument speaks for itself and that parol evidence is not admissible to vary or contradict the terms thereof has little

application to tax cases. It would apply only to agreements between the Commissioner and the taxpayer. Parol evidence is always acceptable where the controversy is not between the parties to the instrument * * *" *Paul and Merten's Income Tax,* Volume 5, Section 43.74.

"It must be remembered that the parol evidence rule does not obtain as to third parties but only between the parties themselves." *Paul and Merten's Income Tax,* Volume 2, Section 11.49.

"The rule (relating to parol evidence to vary or contradict the terms of a writing) is only applicable, however, to controversy between the parties to the instrument and those claiming under them. Where the action is between a stranger and a party to the instrument, either one is in a measure free to vary or contradict it by parol evidence. When the instrument comes in question collaterally, in a suit in which a third party, a stranger to the writings, is a party, neither party is estopped from contradicting it, or from proving facts inconsistent with it." *Holmes and Brewster's Federal Tax Appeals,* 1927, Page 320.

"The rule that parol evidence cannot be received to contradict or vary a written contract, does not apply as against either party in an action between a party to the contract and a third person, as the estoppel on which the rule rests must be mutual, and the third person is not bound by the contract." Syllabus No. 7, *Sigua Iron Company v. Greene,* 88 Fed. 207 (C. C. A. 2nd).

Please see authorities cited at pages 216 and 217 of the report in the Sigua Iron Company case in which *Coke on Littleton* is quoted:

"Every estoppel ought to be reciprocal that is to bind both parties, and this is the reason that regularly a stranger shall neither take advantage of or be bound by an estoppel."

A pronouncement from the opinion of the Supreme Court of North Carolina is cited in this report as follows:

> "They (the strangers are at liberty to show that the written instrument does not disclose the full or true character of the transaction. And, if they be thus at liberty, when contending with a party to the transaction, he must be equally free when contending with them. Both must be bound by this or neither."

The court also quotes with aproval from *McMaster v. Insurance Co.*, 55 N. Y. 222, as follows:

> "Third persons are not precluded from proving the truth, however contradictory to the written statements of others. Strangers to the instrument, not having come into this agreement, are not bound by it, and may show that it does not disclose the very truth of the matter. And as, in a contention between a party to an instrument, and a stranger to it, the stranger may give testimony by parol differing from the contents of the instrument, so the party to it is not to be at a disadvantage with his opponent, and he, too, in such case, may give the same kind of testimony."

> "Likewise there are many other cases which hold that in a controversy between a party to an instrument and a stranger to it, either party may show that the instrument does not speak the truth, and that the general rule does not apply as it does in cases where the controversy arises between the parties who have made an instrument the written memorial of their agreement." *Jones' Commentaries on Evidence*, 1926, Volume 3, Page 2711.

> "In a suit between a party and a stranger, neither is concluded by the contract, but either may give evidence differing from it. *Leo v. Adsit*, 37 N. Y. 78; *McMaster v. Insurance Co.*, 55 N. Y. 222, *Lowell*

Mfg. Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591; *Hankinson v. Vantine,* 152 N. Y. 20, 46 N. E. 292; *Iron Co. v. Greene,* 31 C. C. A. 477, 88 Fed. 207; *Reynolds v. Magness,* 24 N. C. 30; *Dunn v. Price,* 112 Cal. 46, 44 Pac. 354." *O'Shea v. N. Y., C. & St. L. R. Co.,* 105 Fed. 559 at p. 563, (C. C. A. 7).

VI.

CONCLUSION

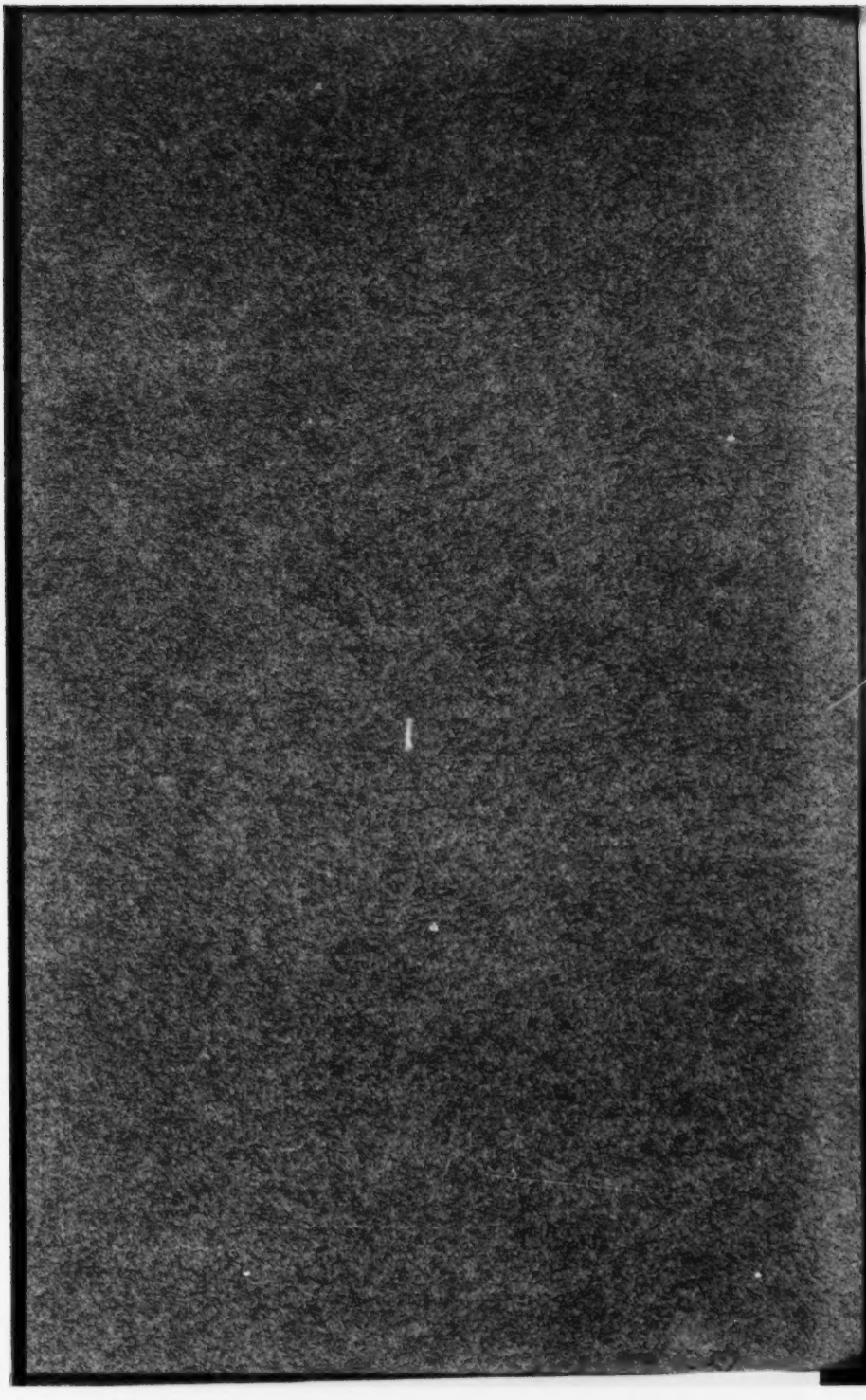
It is submitted that this case is a simple one, but, that through the application of inferences and conclusions, a basis for tax liability has been erected not only without support in the Findings of Fact but in direct contradiction to the facts. In so disposing of the petitioner's rights as a taxpayer, the Circuit Court of Appeals has rejected a fundamental concept emphasized and reemphasized by this Court and other Federal courts in relation to the review of the decisions of administrative tribunals. It was the burden of the petitioner to establish upon the hearing before the Board of Tax Appeals the facts which proclaimed its exemption under the law from the liability for taxes sought to be imposed by the Commissioner. That it discharged this burden unequivocally and without qualification, is recorded in the Findings of Fact, the only source from which the legal consequences must flow. The Circuit Court of Appeals not only has invoked an irrelevant rule of law to preclude the application of the facts as a basis for liability, but has assumed a series of facts not appearing in the record and in direct opposition to the Findings of Fact upon which the taxpayer is entitled to rest his position. In pursuing this course, the court below has not only affronted the entire body of Federal precedent, but has so far departed from

the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is submitted that the foregoing petition for writ of certiorari should be granted.

Respectfully submitted,

THEODORE LEVIN,
BAYRE LEVIN,
Attorneys for Petitioner,
1250 Penobscot Building,
Detroit, Michigan.



INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	8
Conclusion	9
Appendix	10

CITATIONS

Statutes:	
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 23	10
Sec. 111	10
Sec. 112	10
Sec. 113	11
Sec. 114	12
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 23 (U. S. C., Title 26, Sec. 23)	12
Sec. 111 (U. S. C., Title 26, Sec. 111)	12
Sec. 112 (U. S. C., Title 26, Sec. 112)	12
Sec. 113 (U. S. C., Title 26, Sec. 113)	12
Sec. 114 (U. S. C., Title 26, Sec. 114)	12

200436—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 165

THE BORIN CORPORATION, FORMERLY ZERO ICE CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 22–32) is reported in 39 B. T. A. 712. The opinion of the Circuit Court of Appeals (R. 96–101) is reported in 117 F. (2d) 917.

JURISDICTION

The judgment of the court below was entered on February 14, 1941 (R. 95). A petition for rehearing filed by petitioner on March 13, 1941

(R. 103–111) was denied on March 14, 1941 (R. 113). The petition for a writ of certiorari was filed June 14, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the cost of petitioner's dry-ice plant, for purposes of computing depreciation and gain or loss on its sale, is the cost of such plant as fixed under the original contract of purchase of October 10, 1930, or as fixed in a new contract entered into on November 7, 1932.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 10–12.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 22–28) may be summarized as follows:

Petitioner, formerly named Zero Ice Corporation, is a Michigan corporation which was organized November 5, 1930. Upon its incorporation it took over a contract which its organizers had entered into with the York Ice Machinery Corporation for the sale by York to the organizers of a 10-ton solid carbon dioxide plant for use in the manufacture of solid carbon dioxide gas, commonly known as dry ice. (R. 22–23.)

Under the terms of the contract York agreed to install the machinery and equipment in a building to be erected by the purchaser, and guaranteed that the plant would be capable of manufacturing 10 tons of dry ice per 24 hours when properly and continuously operated. York further guaranteed the workmanship and materials for one year after the machinery was put into operation, except for ordinary wear and tear and injuries due to incompetency and carelessness. The purchaser agreed to pay $146,800 for the machinery in question, $12,000 thereof as a down payment and the balance on the due dates of nine interest-bearing notes having maturities between June 15, 1931, and October 15, 1932. (R. 23.)

The contract provided that York should be liable for only direct legal damages and not for consequential damages arising out of any breach of warranty under the contract. It further provided that failure of the purchaser to notify York within 30 days of delivery that the machinery and materials did not fulfill the terms and requirements of the contract would be considered an acknowledgment that the machinery and materials were satisfactory and would constitute a complete acceptance thereof. (R. 24.)

The plant was delivered and installed in May 1931. It was operated intermittently during that month and part of June, and on the basis of its performance, which seemed to be satisfactory, was

accepted by the taxpayer. When the demand for dry ice became constant enough to require continuous operation of the plant, however, it was found that dry ice of the quality and quantity desired could not be produced. During the summer of 1931 petitioner made many complaints to York that the operation of the plant was unsatisfactory. As a consequence, York sent engineers into the plant from time to time and with their assistance it was operated throughout the summer, but production was still not satisfactory. (R. 24–25.)

In March 1932 an arrangement was made under which York agreed to operate the plant at its own expense until such time as it could demonstrate that the plant would produce dry ice in conformity with the guaranties set forth in the contract, and the petitioner agreed to pay one cent per pound for the dry ice produced during the period of York's operation (R. 25).

York operated the plant under this arrangement throughout the summer season of 1932, after which time petitioner was satisfied that the plant would produce 10 tons of dry ice per day of the proper quality, and therefore resumed its operation (R. 25, 97).

This was the first solid carbon dioxide plant designed and manufactured by York, which was the reason for its unusual cooperation during the adjustment period. In addition, the three Borin

brothers, who owned most of petitioner's stock, had been very good customers of York during the 10 years preceding 1932, having purchased water ice-manufacturing equipment worth several hundred thousand dollars and having used York equipment exclusively in six separate water ice plants. Also, petitioner's general manager, who was a former sales representative of York, had assisted in laying out the six water ice plants and had negotiated the sale to petitioner of the dry ice plant here involved. (R. 25–26.)

Because of the unsatisfactory operation of the plant petitioner had refused to pay any more than the initial down payment of $12,000, and on December 31, 1931, by proper entries on its books, it charged back to York both the unpaid notes amounting to $134,800, and the $12,000 cash down payment. Companion entries to the machinery and equipment accounts were also made. In addition, petitioner debited York in the amount of $21,954.61 as the amount of operating losses sustained from the time the plant was installed to the date of entry. Subsequently, an additional charge of $6,555.13 was made, representing operating losses from January 1, 1932, to February 29, 1932. (R. 26.)

In 1932 petitioner and York negotiated with respect to the adjustments to be made in the purchase price of the plant because of its unsatisfactory

initial operation, and arrived at an adjustment of $84,800 computed as follows (R. 26–27):

Interest on investment of Zero Ice Corporation in building and equipment of $84,882.31 for an average of 1½ years, at 9% of total		$7,639.40
Interest on advances to York Ice Machinery Co. to September 1, 1932		1,390.77
Additional interest for one month to October 1932		69.30
Normal depreciation of plant in controversy to average of 1½ years at 15% per annum of 22½% of $146,800		33,030.00
Extraordinary additional defalcation on boilers, double pipe equipment and compressors		4,000.00
Net loss to October 1, 1932 (accepted for convenience as date of settlement):		
Amounts charged on books of the Zero Ice Corporation:		
To December 31, 1931	$22,054.61	
To February 29, 1932	6,555.13	
Net loss from March 1, 1932, to October 1, 1932, and unallocated element of damages arbitrarily agreed to compensate for lost profits in order to make even amount of $84,800	10,060.79	
		38,670.53
Total amount agreed upon as damages and set off against balance of liability of $134,800		84,800.00

While it was first contemplated that this amount would be allowed as a credit against petitioner's liability under the original contract, it was subsequently agreed that a new contract be executed which provided expressly that the original agreement of October 10, 1930, "is hereby rescinded, and the rights of the parties under the said contract or arising out of the same are hereby mutually cancelled." Under the terms of the new contract, York agreed to sell the carbon dioxide plant for $72,467, which was composed of $62,000, the difference between the $84,800 allowance and the original contract price of $146,800, plus

$10,467, representing the repayment of a $10,000 loan previously made by York to petitioner and $467 interest thereon. The $12,000 previously paid by petitioner was treated as the cash payment required on the execution of the new contract, under which the plant was to remain the property of York until the entire purchase price was paid. (R. 27–28, 98–99.)

In computing its depreciation deduction on the plant for the years 1933 and 1934 petitioner used as its basis the sum of $146,800, the purchase price recited in the rescinded contract of October 30, 1930. When the plant was sold in 1934, petitioner used the same basis in computing profit thereon. (R. 28.)

In its original return for 1932, petitioner reported no income with respect to any of the adjustments made in that year between it and York in the matter of the purchase price of the plant. On February 26, 1935, however, it filed an amended return for 1932 and reported therein the receipt of additional income in the sum of $57,482.44, designated as profit realized on the execution of the contract of November 7, 1932, and paid the resulting tax and interest thereon. (R. 28.)

The Commissioner of Internal Revenue computed petitioner's depreciation allowance on a cost basis of $62,000, representing the total sum of $72,467 recited in the contract of November 7, 1932, minus the $10,000 loan and $467 interest.

(R. 28.) Petitioner's profit on the sale of the plant in 1934 was computed on the same basis (R. 28). The Board of Tax Appeals sustained the Commissioner's determination (R. 22–33) and the Circuit Court of Appeals affirmed (R. 95–101).

ARGUMENT

This case presents no conflict with any decision of this Court or of any other circuit court of appeals and involves no question of general importance. Further, the decision below is plainly correct.

The single question presented is whether, for income tax purposes, the cost of petitioner's dry-ice plant is the purchase price provided in the rescinded and abrogated contract of October 10, 1930, or is that contained in the subsequent contract of November 7, 1932, by which the parties rescinded the earlier agreement and the terms of which they actually carried out.

Petitioner is in error in its assertion (Pet. 8–9) that the court below refused to accept the Board's findings of fact. The Board found that the cost to petitioner was the price established by the 1932 contract, and the Circuit Court of Appeals held, in conformity with the well-established rule that a finding of fact by the Board is conclusive on appeal if supported by substantial evidence, that "The conclusion drawn by the Board is supported by the record" (R. 100). It accordingly affirmed the Board's decision.

Petitioner is also in error in its assertion (Pet. 6) that the court below erroneously applied the parol evidence rule. The court specifically stated that "In a controversy between the Commissioner and the petitioner, the petitioner may go behind the written contract and introduce parol evidence in contradiction of the express statements of the instrument. *Commissioner* v. *H. F. Neighbors Realty Co.*, 81 Fed. (2d) 173 (C. C. A. 6)" (R. 99). It then continued, "However, upon the testimony adduced, we think that the decision of the Board must be affirmed. While the evidential facts are not in controversy, more than one finding of fact may be deduced from the evidential facts, and the findings of the Board are binding upon this court if supported by the record" (*id*).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HUBERT L. WILL,
Special Assistants to the Attorney General.

JULY 1941.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(k) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

* * * * *

(m) *Basis for depreciation and depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b), and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111,

shall be recognized, except as hereinafter provided in this section.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS. (a) *Basis (unadjusted) of property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(b) *Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

(A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, including taxes and other carrying charges on unimproved and unproductive real property, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws. Where for any taxable year prior to the taxable year 1932 the depletion allowance was based on discovery value or a percentage of income, then the adjustment for depletion for such year shall be based on the depletion which

would have been allowable for such year if computed without reference to discovery value or a percentage of income;

* * * * *

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property.

* * * * *

Section 23 (l) and (n) of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U. S. C., Title 26, Sec. 23), is identical in all material respects with Section 23 (k) and (m), respectively, of the Revenue Act of 1932, above-quoted. Sections 111 (a), 112 (a), 113 (a) and (b), and 114 (a) of the Revenue Act of 1934 (U. S. C., Title 26, Secs. 111, 112, 113, 114) are identical in all material respects with the corresponding sections of the Revenue Act of 1932, above-quoted.

U. S. GOVERNMENT PRINTING OFFICE, 1941